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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435

BOWMAN DAIRY COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND
WILLIS L. HOTCHKISS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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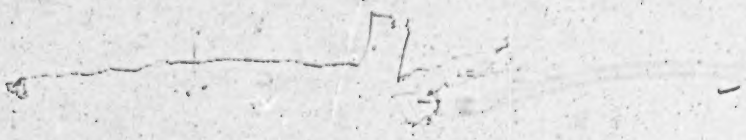
December, 1950.



INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Rules involved	3
Statement	4
Reasons for granting the writ	9
Conclusion	22

CITATIONS.

Cases.

Re Attorney General of the United States, 160 N. Y. Misc. 533	14
Bowles v. Ackerman, 4 F. R. D. 260	18
Coloniger v. State, 91 Tex. Cr. R. 143	14
Commonwealth v. Jordan, 207 Mass. 259	12, 14
Cramer v. State, 145 Neb. 88	14
Daly v. Dimock, 55 Conn. 579	14
Essgee Company v. United States, 262 U. S. 151	19
Ex Parte Collette, 337 U. S. 55	17
Gemsco, Inc. v. Walling, 324 U. S. 244	17
Gooch v. United States, 297 U. S. 124	17
Hickman v. Taylor, 329 U. S. 495	11, 16
Jenkins v. State, 45 Tex. Cr. 173	14
Matter of Hughes v. Kings County Court, 181 N. Y. Misc. 668	14
Mohler v. Commonwealth, 132 Va. 713	14
Padgett v. State, 64 Fla. 389	14

People v. Bellows, 1 How. Pr. N. S. 149 14
People v. Buzan, 351 Ill. 610 14
People v. Gatti, 167 N. Y. Misc. 545 14
People v. Gerold, 265 Ill. 448 13
People v. Kresel, 142 N. Y. Misc. 14
People v. Miller, 257 N. Y. 54 14
People v. Radeloff, 140 N. Y. Misc. 690 14
People v. Rogas, 158 N. Y. Misc. 567 14
People v. Walsh, 262 N. Y. 140 14
People v. Wargo, 149 N. Y. Misc. 461 14
Reg v. Spry, 3 Cox C. C. 221 14
Rex v. Harrie, 6 Carr. & Payne 105, 172 Eng. Rep. 1165 14
Rex v. Holland, 4 T. R. 690, 100 Eng. Rep. 1248 .....12, 14
Securities and Exchange Commission v. Joiner Leasing Corp., 320 U. S. 344 17
Shores v. United States, 174 F. 2d 838 13
Spinkle v. State, 137 Miss. 731 14
State v. Bramhall, 134 La. 1 14
State v. Bunk, 63 Atl. 2d 842 11
State v. Burris, 198 Ia. 1156 14
State v. Cola, 35 N. E. 2d 758 14
State v. Clark, 21 Wash. 2d 774 14
State v. Dorsey, 207 La. 928 14
State v. Haas, 188 Md. 63 14
State v. Hinkley, 81 Kan. 838 14
State v. Howland, 100 Kan. 181 14
State v. Lowery, 160 La. 811 14
State v. Morrison, 175 Wash. 656 14
State v. Murphy, 154 La. 190 13-14
State v. Superior Court, 39 Ariz. 242 13-14
State v. Tippett, 317 Mo. 319 14
Third National Bank & Trust Co. v. United States, 53 F. 2d 599 18
United States v. Beekman, 155 F. 2d 580 13

United States v. Bondy, 171 F. 2d 642 ..... 9, 10
United States v. Bowman Dairy Company, et al., No. 48 Cr. 361 (N. D. Ill.) 16
United States v. Brumfield, 85 F. Supp. 696 ..... 11, 17
United States v. Burr, 25 Fed. Cas. No. 14,692d 12, 13
United States v. Grayson, 166 F. 2d 863 13
United States v. General Motors Corp., 2 F. R. D. 528 18
United States v. B. Goedde & Co., 40 F. Supp. 523 13
United States v. Hiss, 9 F. R. D. 515 ..... 11, 17
United States v. Hiss, No. C128-402 (S. D. N. Y.) ... 11, 13
United States v. Hutton, 26 Fed. Cas. No. 15,433 (10 Benedict 268) 18
United States v. Littell and Marks, No. C127-420 (S. D. N. Y.) 10, 11
United States v. Maryland & Virginia Milk Producers Ass'n, 9 F. R. D. 509 ..... 11, 17
United States v. Henry S. Morgan, No. 43-757 (S. D. N. Y.) 15
United States ex rel. Roger Touhy v. Ragen and McSwain, No. 83, October Term, 1950 7
United States v. Rich, 6 Alaska 670 13
United States v. Warren, 53 F. Supp. 435 13
United States v. Yellow Cab Co., 338 U. S. 338 18
United States v. Youngs, 28 Fed. Cas. No. 16783 (10 Benedict 264) 18
Utah Junk Co. v. Porter, 328 U. S. 39 17
Wilson v. United States, 221 U. S. 361 19
Zimmerman v. Poindexter, 74 F. Supp. 933 18

Rules and Statutes.

Federal Rules of Civil Procedure, Rule 45(b) 18
Federal Rules of Criminal Procedure:
Rule 2 ..... 4, 9, 16, 17
Rule 16 ..... 3, 4, 6, 8, 10, 11, 12, 13, 17, 18
Rule 17 (a) 19

Rule 17 (c) .....
..... 2, 3, 4, 5, 6, 8, 10, 11, 13, 14, 15, 16, 17, 18, 19, 21, 22
Rule 54 (c) 6
Sherman Act, Sec. 1 4
Title 28 U. S. C. Sec. 636 18

Miscellaneous.

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Dession, "The New Federal Rules of Criminal Procedure: II" (1947), 56 Yale L. J. 197 20
Dession, "The Trial of Economic and Technological Issues of Fact: I and II" (1949), 58 Yale L. J. 1019 and 1242 20
McAllister, "The Big Case: Procedural Problems in Antitrust Litigation" (1950), 64 Harv. L. Rev. 27 ..... 15, 20, 21
Note, 7 Fordham L. Rev. 449 14
Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946) 9
Report of Judicial Conference of United States held at Washington, D. C., September 22-24, 1949 20
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Yankwich, "Observations on Anti-Trust Procedures" (1950), 10 F. R. D. 165 21

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on November 7, 1950.

OPINIONS BELOW.

Neither the opinion of Judge Duffy (R. 128-134), nor the concurring opinion of Judge Major (R. 134-138), nor the dissenting opinion of Judge Lindley (R. 139), has been officially reported.

JURISDICTION.

The judgment of the court of appeals was entered on November 7, 1950 (R. 140). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1) and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

Pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, the district court ordered the respondent Hotchkiss, an attorney for the Government, to permit the petitioners and their attorneys to inspect certain documents in the possession of respondent Hotchkiss. For refusal to comply with this order, respondent Hotchkiss was adjudged in contempt of court. The court of appeals reversed.

The following questions are presented:

I. Whether a defendant in a criminal case may never inspect, in advance of trial, documents obtained by the Government by means other than seizure or process.

II. Whether the discretionary provisions of Rule 17(c) of the Federal Rules of Criminal Procedure empower a district court to order Government counsel to produce documents for pre-trial inspection by defendants and their attorneys.

III. Whether orders directing compliance with pre-trial subpoenas *duces tecum* may properly be directed to attorneys for the Government, or only to persons other than parties or their attorneys.

IV. Whether the Federal Rules of Criminal Pro-

cedure confirm the power of a district court to expedite litigation and promote its orderly handling by requiring both parties to make documents available in advance of trial.

RULES INVOLVED.

Rule 17(c) of the Federal Rules of Criminal Procedure provides as follows:

> "For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Rule 16 provides as follows:

> "Discovery and Inspection. Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

Rule 2 provides as follows:

> "Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

STATEMENT.

The indictment in this case charges eight corporations and nine corporate officers with a criminal conspiracy to violate Section 1 of the Sherman Act (R. 3-9).[1] Motions by the petitioners, defendants below, to dismiss the indictment were based in part upon the vagueness and indefiniteness of the charge therein laid. These motions were denied on April 13, 1949 (R. 117). Thereafter, on June 13, 1949, each petitioner sought to ascertain the specific facts upon which the indictment was based and the full nature and cause of the accusation by filing three motions[2] (R. 117):

1. A motion under Rule 17(c) of the Federal Rules of Criminal Procedure for a subpoena *duces tecum* requiring the Government to produce for petitioners' inspection certain documents obtained by the Government by means other than seizure or process (R. 10-27);

2. A motion under Rule 16 for an order directing the Government to produce for inspection certain other documents which the Government had obtained by seizure or by process (R. 28-46);

1. The indictment was returned on July 30, 1948, by a grand jury sitting in the Northern District of Illinois, Eastern Division (R. 2).

2. The petitioners also filed a motion to strike surplusage from the indictment (R. 117); this motion was granted (R. 75).

3. A motion for a bill of particulars (R. 117).

The district court granted parts of the first two motions and denied the motion for a bill of particulars except in two minor respects (R. 64, 69-70, 75).

The motion for a subpoena under Rule 17(c) was served on Government counsel and presented to the district court before the subpoena was issued (R. 117, 48-49). At a full hearing on October 24, 1949 (R. 119), with Government counsel participating, the court directed the defendants to limit the scope of the proposed subpoena (see parenthetical exceptions and limiting clauses set off by (a), (b) and (a), (b) and (c) in quotation from subpoena, *infra*, pp. 5-6). The motion for a subpoena was then granted orally from the Bench on that day (R. 119). The subpoena *duces tecum* was addressed to respondent Willis L. Hotchkiss, Special Assistant to the Attorney General, and was served on November 1, 1949 (R. 48-50). On November 7, 1949, after a hearing to settle the order to comply with the subpoena (R. 51-63), the district court entered an order (R. 69-71) directing respondent Hotchkiss, pursuant to Rule 17(c), to produce for petitioners' inspection the books, papers and documents designated in the subpoena. A copy of the subpoena was attached to the district court's order. It directed production of (R. 71):

> "* * * all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury;

or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

The Government subsequently moved to quash the subpoena issued under Rule 17(c), and to set aside the order of November 7, 1949, which directed compliance with this subpoena (R. 72-73). The grounds for the motion were: (a) that under Rule 17(c) of the Federal Rules of Criminal Procedure, a subpoena for the production of documents may not issue against an attorney for the Government; (b) that the district court had no jurisdiction to order the attorneys for the Government to produce, for inspection by defendants, documents and other papers designated in a subpoena issued under Rule 17(c); and (c) that the right of defendants in criminal proceedings to obtain access to documents and other papers in the custody of an "Attorney for the Government", as defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted by Rule 16 of said Rules (R. 72-73). The Government did not challenge the form or the timeliness of the subpoena (R. 61, 62, 72-73, 74, 103-104).

On January 4, 1950, the district court denied the Government's motion to quash (R. 83-84). Respondent Hotchkiss thereupon submitted to the district court an affidavit, which averred that all of the documents which the district court had ordered produced were in his custody (R. 84-85). The statement summarized asserted reasons why the district court had no jurisdiction under Rule 17(c) to enter a pre-trial inspection order against an attorney for the Government, and set forth that the respondent Hotchkiss, acting on the advice and instructions of the Attorney General of the United States and the Assistant Attorney

General in charge of the Antitrust Division, respectfully declined to comply with the district court's order of November 7, 1949 (R. 86-87). Although this statement contended that some of the documents were privileged (R. 85), this point was not argued in the district court and was not briefed or argued in the court below.[3]

On January 5, 1950, the district court entered an order finding respondent Hotchkiss guilty of contempt for refusing to produce the documents designated in the subpoena *duces tecum*, and for refusing to comply with the court's order of November 7, 1949. While the court did not impose any other penalties on the respondent Hotchkiss, the order committed him to the custody of the Attorney General until he should comply with the provisions of the subpoena *duces tecum* and should obey the district court's order of November 7, 1949, or until he should be discharged from custody by due process of law (R. 99). On the same day, respondent Hotchkiss took an appeal from the order holding him in contempt of court (R. 100) and, by an order of the Court of Appeals for the Seventh Circuit, he was admitted to bail on his own recognizance until further order of that court (R. 102).

On November 7, 1950, the court of appeals filed its opinions, and entered a judgment reversing the order of the district court. Each of the three judges of the court of appeals filed a separate opinion. Judge Duffy rendered the first opinion, Chief Judge Major rendered a concurring opinion, and Judge Lindley rendered a dissenting opinion. (R. 128-140.) The opinion of Judge Duffy interpreted Rule 17(c) in the light of the legislative history of Rule 16 and in the light of the early English common law; he concluded that Rule 17(c) was not in-

3. In these proceedings, the Government has never relied on Department of Justice Order No. 3229 and Supplement No. 2 thereto which are involved in *United States* ex rel. *Roger Touhy* v. *Ragen and McSwain*, No. 83, present Term, recently argued here.

tended to authorize the inspection of documents obtained by the Government by means other than seizure or process, on the ground that the inspection of such documents was "expressly prohibited by Rule 16". Judge Duffy held that Rule 17(c) provides only "for the traditional trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial." (R. 128-134.)

Chief Judge Major's opinion took the position that the Government and its attorneys were excluded from the scope of Rule 17(c), in view of the word "person" therein, and that Rule 17(c) applies merely to witnesses who are not parties or attorneys (R. 134-138).

In his dissenting opinion, Judge Lindley pointed out that the majority opinion "read Rule 17(c) out of the books—completely delete[d] it". He stated that the majority opinion "does violence to the plain language of" Rule 17(c). Judge Lindley was of the opinion that under Rule 17(c), the extent of relief to be granted thereunder was placed "within the discretion of the trial court." (R. 139.)

REASONS FOR GRANTING THE WRIT.

The resolution of the questions presented has great significance quite apart from the facts and parties here involved, in that the decision of the court of appeals calls into question "the spirit that is intended to motivate the application of all the sixty Rules promulgated by the Supreme Court" and fails to make it "clear that they are not in any case to be interpreted technically so as to defeat the ends of justice".[4] It presents a conflict with the only other decision of another court of appeals on the same matter. *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2). No question of abuse of discretion was presented in either the *Bondy* case or this case (R. 139). The decisions of several district courts are in hopeless conflict as well. The conflict is epitomized by the three opinions of the Court of Appeals for the Seventh Circuit in the instant case. The decision of the court below in effect forecloses the use of sound judicial discretion by a trial court under the Federal Rules of Criminal Procedure to bring about a "just determination of every criminal proceeding [and] * * * to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay".[5]

4. Chief Justice Vanderbilt, Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), p. 121; see also p. 120.

5. Rule 2, Federal Rules of Criminal Procedure, p. 4, *supra*.

I.

The court of appeals held that the district court was without jurisdiction to order an attorney for the Government to produce before trial, for inspection by petitioners, any evidence which would not have been subject to a motion for discovery and inspection under Rule 16.

The Court of Appeals for the Second Circuit, in *United States* v. *Bondy*, 171 F. 2d 642, reached exactly the opposite conclusion. District Judge Bondy had ordered the Government in the proceeding of *United States* v. *Littell and Marks* (Case No. C127-420, S. D. N. Y.) to produce documents subpoenaed under Rule 17(c) (including documents not obtained from or belonging to defendants and not obtained from others by seizure or process) although the same documents could not have been included in a discovery order under Rule 16. The Government sought a writ of mandamus from the court of appeals to direct Judge Bondy to vacate the order. As in the instant case, the Government argued that Rule 17(c) granted the trial judge no authority to require pre-trial production of the documents subpoenaed. The Court held (171 F. 2d at p. 644):

> "So much of the order [of the District Court] as directs production of the documents designated in the subpoena is authorized by Rule 17(c). The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction."[6]

One Circuit thus holds that it is beyond a district court's jurisdiction to permit pre-trial inspection of documents under Rule 17(c), when the same evidence could not be inspected pursuant to Rule 16. The other Circuit holds that to make such use of Rule 17(c) is within the district court's jurisdiction and discretion. A direct conflict therefore

6. The question whether the district court abused its discretion in the instant case was not raised in the court below (R. 139).

exists. The importance of the matter in conflict is considerable, as will appear from the further reasons developed below.

District courts also differ widely in their interpretations of Rule 17(c) and in their views as to its relation to Rule 16. District courts, in Illinois and New York, have permitted subpoenas *duces tecum* in this and similar cases,[7] while district courts in the District of Columbia, Louisiana and New York have declined to permit similar use of Rule 17(c).[8] While each case differs from the others in one or more material facts, the views of the respective judges still cannot be reconciled. As was true in *Hickman* v. *Taylor*, 329 U. S. 495, 500, this case presents a "problem which has engendered a great divergence of views among district courts," and certiorari should therefore be granted.

II.

The impact of the decision below is not limited to the determination of how a procedural enactment should be interpreted and applied, although that effect is far-reaching. The decision below denies to defendants in criminal cases certain basic privileges which are deeply rooted in the

7. Pre-trial inspection subpoenas have been granted against the Government under Rule 17(c) in *United States* v. *Hiss*, Case No. C128-402, (S. D. N. Y., unreported opinion of November 10, 1949); *United States* v. *Littell and Marks*, Case No. C127-420 (S. D. N. Y., orders of October 30, 1948 and May 16, 1949); and the instant case (R. 69-70). In *State* v. *Bunk*, 63 Atl. 2d 842 (Cy. Ct. N. J., 1949) Rule 2:5-8(c) of the New Jersey Rules of Criminal Practice, which is identical with Rule 17(c), was construed as authorizing pre-trial inspection by defendants of records of a state reformatory and a state penitentiary, and of a murder weapon. The narrative statements which were withheld from examination were comparable to those excluded from the subpoena in the instant case (see material in parentheses in second sentence of subpoena; p. 5, *supra*, and R. 71).

8. *United States* v. *Maryland & Virginia Milk Producers Association*, 9 F. R. D. 509 (D. D. C.); *United States* v. *Brumfield*, 85 F. Supp. 696 (W. D. La.); *United States* v. *Hiss*, 9 F. R. D. 515 (S. D. N. Y.).

American common law and which, as Chief Justice Marshall pointed out in *United States* v. *Burr*, 25 Fed. Cas., Case No. 14692d at p. 33, are afforded to an accused person by necessary implication from the Sixth Amendment's guarantee of his right "to have compulsory process for obtaining witnesses in his favor."

The majority opinion below holds that any form of pre-trial inspection by defendants of documentary evidence in the possession of the prosecution was a "startling innovation" (R. 131).[9] In stating that no *right* of inspection was recognized at common law, the opinion below may have been correct, but in holding that the district court had no discretion to grant a *privilege* of inspection except as permitted by Rule 16, the court made, we submit, a fundamental error.

Even before adoption of the United States Constitution, courts of the American states had departed from the concept of royal prerogative which, in the British common law, had barred defendants' access to the Crown's evidence until the moment such evidence was introduced during the trial. Those early decisions of the State courts were rec-

9. The opinion relied (R. 131) on a statement by Professor Wigmore that "At common law no right of inspection of documents before trial was conceded to the accused" (6 Wigmore on Evidence (3rd ed., 1940) §1859*g*). Petitioners do not urge that they have a right of inspection under Rule 17(c) but merely a privilege of inspection when, as here, the district court adjudges such an inspection to be warranted. Moreover, Wigmore's statement was evidently referring to the early English common law, which has been modified (see Note 11, *infra*), for he relied solely on *Rex* v. *Holland*, 4 T. R. 690, 100 Eng. Rep. 1248 (1792) and *Commonwealth* v. *Jordan*, 207 Mass. 259 (1911). The latter case held that it was within the discretion of the trial court to grant or refuse a motion to furnish the defendant, accused of murder, with a report of the autopsy on the victim (207 Mass. at pp. 264-265). Wigmore states that "considerations of fairness * * * call also for conceding the opportunity of inspection of documents" by an accused; he is highly critical of the early English rule (*ibid.*; see also *op. cit.* §§ 1850, 1859, 1863; 2 Bishop, *New Criminal Procedure* (2d ed., 1913) pp. 771-772).

ognized by Chief Justice Marshall during the trial of Aaron Burr (see 25 Fed. Cas. at p. 34) when he honored defendant Burr's right to subpoena from the President of the United States, for pretrial inspection, certain letters deemed by Burr to be essential to his defense. At the recent trial of Alger Hiss a district judge also granted a subpoena *duces tecum* for pretrial inspection of documents in possession of the Government.[10] In neither case would the evidence in question have come within the limits of Rule 16. While the issue here arises under Rule 17(c) of the Federal Rules of Criminal Procedure, it involves the same basic principles of constitutional law which were applied in the cases of the early American period.

In the interim, there have been innumerable occasions when trial courts in criminal cases have felt that justice required them to permit defendants to have access before or during the trial to evidence which the prosecutor attempted to withhold. During this long period, the means employed by defendants who sought to examine evidence in such circumstances have included subpoenas *duces tecum* directed to whatever officer of the Government had possession or custody of the evidence in question. *United States* v. *Burr*, 25 Fed. Cas. No. 14,692d at pp. 34-35, 37, 38; *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2); cf. *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 534 (E. D. Ill.); *United States* v. *Warren*, 53 F. Supp. 435, 436 (D. Conn.); *People* v. *Geroid*, 265 Ill. 448, 469-471 (1914).[11]

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10. *United States* v. *Hiss*, Case No. C128-402 (S. D. N. Y.), unreported opinion of November 10, 1949.

11. See also discussion in *Shores* v. *United States*, 174 F. 2nd 838, 844-845 (C. A. 8); see *United States* v. *Rich*, 6 Alaska 670 (1922);

It would appear that the accused's common law privilege of inspecting documentary evidence before trial in appropriate cases, whether or not the evidence has been obtained by the prosecuting authorities by seizure or process, would be completely abrogated by the narrow construction of Rule 17(c) adopted by the majority of the court below.

The American common law cases permitting inspection were sometimes complementary to the indictment and bill of particulars. In this case, the district court had previously denied petitioners' motions to dismiss the indictment (R. 117). In addition, except to a very limited extent, the court had denied the defendants' motions for a bill of particulars at the very time that it denied the Government's motion to quash this subpoena (R. 75). Thus,

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State v. *Superior Court*, 39 Ariz. 242, 249-250 (1931); *Daly* v. *Dimock*, 55 Conn. 579 (1827); *People* v. *Buzan*, 351 Ill. 610, 618 (1933); *Padgett* v. *State*, 64 Fla. 389, 395-396 (1912); *State* v. *Burris*, 198 Ia. 1156, 1162 (1924); *State* v. *Howland*, 100 Kan. 181, 185 (1917); *State* v. *Hinkley*, 81 Kan. 838, 846-848 (1910); *State* v. *Dorsey*, 207 La. 928, 964-966 (1945); *State* v. *Lowery*, 160 La. 811 (1926); *State* v. *Murphy*, 154 La. 190, 203 (1926); *State* v. *Bramhall*, 134 La. 1 (1913); *State* v. *Haas*, 188 Md. 63, 70-76 (1947); *Commonwealth* v. *Jordan*, 207 Mass. 259, 264-265 (1911); *Spinkle* v. *State*, 137 Miss. 731, 732-733 (1925); *State* v. *Tippett*, 317 Mo. 319, 326-327 (1927); *Cramer* v. *State*, 145 Neb. 88, 94-96 (1944); *People* v. *Walsh*, 262 N. Y. 140, 149-150 (1933); *People* v. *Miller*, 257 N. Y. 54, 57, 58-59 (1931); *Matter of Hughes* v. *Kings County Court*, 181 N. Y. Misc. 668, 672-673 (1943); *People* v. *Gatti*, 167 N. Y. Misc. 545 (1938); *Re Attorney General of the United States*, 160 N. Y. Misc. 533 (1937); *People* v. *Rogas*, 158 N. Y. Misc. 567 (1936); *People* v. *Wargo*, 149 N. Y. Misc. 461, 463-464 (1933); *People* v. *Kresel*, 142 N. Y. Misc. 88 (1931); *People* v. *Radeloff*, 140 N. Y. Misc. 690 (1931); *People* v. *Bellows*, 1 How. Pr. N. S. 149 (N. Y. O. & T., 1884); *State* v. *Cala*, 35 N. E. 2d 758, 760-761 (Ohio Ct. of Apps., 1940); *Colonigar* v. *State*, 91 Tex. Cr. R. 143, 146 (1922); *Jenkins* v. *State*, 45 Tex. Cr. R. 173, 176 (1903); *Mohler* v. *Commonwealth*, 132 Va. 713, 720 (1922); *State* v. *Clark*, 21 Wash. 2d 774, 778 (1944); *State* v. *Morrison*, 175 Wash. 656, 658 (1933); Note, 7 Fordham L. Rev. 449 (1938). Although the very early English common law did not recognize any privilege of inspection in criminal cases, the early English rule has been liberalized. Compare *Rex* v. *Holland*, 4 T. R. 690, 100 Eng. Rep. 1248 (1792) with *Rex* v. *Harrie*, 6 Carr. & Payne 105, 172 Eng. Rep. 1165 (1833) and *Reg.* v. *Spry*, 3 Cox C. C. 221 (1848).

the instant order, just as in some of the foregoing American common law cases, was designed to insure that defendants be properly informed of the factual issues.

It is interesting to note the observations of Judge Medina concerning a similar point in a civil antitrust proceeding:

> "I am going to find some way, whether by these interrogatories or some equivalent process, of advising the Government at some appropriate time to disclose to these defendants, to each of them, just exactly what they are charged with. . . . There is no use of our fussing about as to whether we call it a bill of particulars or call it answers to interrogatories.
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> "What I am concerned about is seeing to it that when these defendants go into this trial they will know exactly what they have to meet factually, and that is what I think they are entitled to in some way or another" (Hearings in *United States* v. *Henry S. Morgan*, No. 43-757 (S. D. N. Y., October 30, 1947), as quoted in McAllister, "The Big Case: Procedural Problems in Antitrust Litigation" (1950), 64 Harv. L. Rev. 27, 31-32).

These observations apply *a fortiori* to a criminal proceeding in view of the guarantees of the Fifth and Sixth Amendments.

The decision of the court below contravenes the policy of the American common law decisions and of the Federal Rules of Criminal Procedure, which is to further the interests of justice and fairness by affording due notice to defendants of the charges against them and enabling them to prepare their defense.

III.

Rule 17(c) is the only one of the Federal Rules of Criminal Procedure which authorizes issuance and enforcement of subpoenas *duces tecum*. It was interpreted so narrowly by the court below that it cannot possibly perform

the function of providing a simple, expeditious, and general method of procuring the production of evidence for pre-trial inspection. This crippling interpretation of the Rule is as harmful to the Government as it is to defendants. In this connection, the Court may wish to take judicial notice of the fact that in May 1950, long before trial, the Government in a related criminal case, *United States* v. *Bowman Dairy Company, et al.*, 48 CR 361 (N. D. Ill.), employed Rule 17(c) to obtain considerable documentary evidence from one of the corporate petitioners herein. The decision below would foreclose the Government, after indictments, from pre-trial inspection of documentary evidence in the possession of defendants. Thus, an authoritative construction of Rule 17(c) would appear to be of importance to the Government as well as to private parties.

Absent an authoritative decision, there will surely be much floundering and confusion in the district courts on the elementary question of the proper method of obtaining evidence for pre-trial inspection. Certiorari should be granted here, as in *Hickman* v. *Taylor*, 329 U. S. 495, 497, dealing with the Civil Rules, because "This case presents an important problem under the Federal Rules" of Criminal Procedure.

Petitioners relied in the court below upon three paramount principles of statutory construction: (1) the principle that the general policy of an enactment permeates its every provision, and hence that Rule 17(c) must be applied consistently with the general policy of the Federal Rules of Criminal Procedure as expressed in Rule 2, *supra*, p. 4; (2) the principle that the plain language of a statute must be given full effect; and (3) the principle that where no ambiguity appears on the face of a statutory provision, extrinsic aids, such as legislative history of another statutory provision, should not be employed.

Judge Duffy's opinion ignores the policy expressed in Rule 2 and, as pointed out by Judge Lindley (R. 139), "does violence to the plain language" of Rule 17(c). Judge Duffy's opinion points out no ambiguity in the language of Rule 17(c) but nevertheless adopts an argument based on legislative history. The legislative history relied on, moreover, was not that of Rule 17(c) itself; it was that of another rule, Rule 16. In concluding that the limitations of Rule 16 must be read into Rule 17(c)[12], the court below erred by its reliance upon the legislative history of Rule 16. *Ex Parte Collett*, 337 U. S. 55, 61; *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 43-44; *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 266.

Apparently Judge Duffy relied (R. 131-134) upon the *ejusdem generis* rule in interpolating the limitations of Rule 16 into Rule 17(c). But the *ejusdem generis* rule is only to be followed where there is uncertainty in statutory language and where the result of its application will not conflict with the general purposes of the statute. *Gooch* v. *United States*, 297 U. S. 124, 128; *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, 320 U. S. 344, 350-351. Here there is no uncertainty in the language of Rule 17(c), and the application of the *ejusdem generis* rule would contravene the liberal purposes of the Criminal Rules, which are declared in Rule 2.

Judge Duffy also decided that under the district court's interpretation, Rule 17(c) would operate as an "unrestricted pre-trial discovery device" and create "an almost unlimited right of discovery" (R. 134, 132). The

12. Of the three district court cases on which the court below relied (R. 132-134), only the *Brumfield* case took the position that Rule 17(c) should be limited by Rule 16. In that case, the court also gave the grand jury privilege and prematurity as reasons for denying the remedy sought. The *Hiss* and *Maryland & Virginia Milk* cases were decided on the bases of privilege, prematurity and broadness of the subpoenas, none of which is an issue here. In addition, the motion to quash the subpoena in the *Hiss* case was granted largely because of the *ex parte* nature of Judge Conger's order (9 F. R. D. at p. 516), whereas the order involved here was not an *ex parte* one.

contrary is true. Rule 17(c) is a discretionary rule and contains its own limitations; for the rule itself is merely permissive and, in addition, authorizes the district court to quash or modify unreasonable or oppressive subpoenas. The terms of Rule 17(c) are restricted and limited, and grant no "right" of discovery, but merely a privilege to inspect all, or part of, the subpoenaed documents, if the district court should decide that such inspection is warranted.

The concurring opinion of Judge Major, although recognizing that Rules 16 and 17(c) are each "designed to serve a separate and distinct purpose" (R. 138), holds that the word "person" in Rule 17(c) does not apply to the Government or its attorneys. This highly technical construction has never been adopted by any of the courts which have considered Rule 17(c), and was not urged in the Government's briefs in the court below. In fact, at the oral argument below, Government counsel repeatedly conceded that Rule 17(c) applied to the Government (R. 134, note 1). Moreover, Rule 17(c) is "substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure" (see note of Advisory Committee following Rule 17(c)), and Rule 45(b), which also uses the term "person", has been construed to include the Government within the meaning of that term. *Bowles* v. *Ackerman*, 4 F. R. D. 260 (S. D. N. Y.); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933, 934 (D. Hawaii); *cf. United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341-342; *United States* v. *General Motors Corp.*, 2 F. R. D. 528 (N. D. Ill.).[13]

13. The Advisory Committee's note on Rule 45(b) states that it "broaden[s] U. S. C., Title 28, §636 (Production of books and writings) to include all actions and to extend *to any person*" (Italics supplied.) Section 636 was held to apply to production against the United States (*Third National Bank & Trust Co.* v. *United States*, 53 F. 2d 599 (C. A. 6); *United States* v. *Youngs*, 28 Fed. Cas. No. 16783 (10 Benedict 264) (S. D., N. Y.); *United States* v. *Hutton*, 26 Fed. Cas. No. 15,433 (10 Benedict 268) (S. D., N. Y.)).

Judge Major's opinion decides (R. 135) that a command to produce documents under Rule 17(c) may only be a part of a subpoena to give testimony under Rule 17(a); in effect, it holds that Rule 17(c) merely permits a *duces tecum* clause to be added to an *ad testificandum* subpoena. The analysis is incorrect. It is well recognized that a subpoena may contain either an *ad testificandum* clause or a *duces tecum* clause, or both. The lack of an *ad testificandum* clause does not invalidate a subpoena *duces tecum*. *Wilson* v. *United States*, 221 U. S. 361, 372-374; *Essgee Company* v. *United States*, 262 U. S. 151, 157.

Judge Major's opinion then asserts that to subpoena either party or an attorney for either party under Rule 17 to give testimony or produce documents would be a "novelty" and an "anomaly" (R. 135, 136), and concludes that "a party or an attorney" is not a "person" within the meaning of Rule 17(a) or of Rule 17(c). Hence, Judge Major declares, a party or attorney may not be subpoenaed under Rule 17(c) to produce documents. This conclusion ignores the possibility that a person may be both a "witness" and a "party", subject, of course, to personal privileges. In this case, the subpoena was not addressed to a party, but to an attorney for the United States. The argument as to whether a party is a person within the meaning of Rule 17(c) is thus not relevant here. Moreover, it is possible for a person to be both a "witness" and the attorney for a party, subject in that case to the attorney-client privilege. The Government, however, did not raise any question of privilege in the court below, and Judge Major's opinion is not rested on this ground.

Despite the suggestions to the contrary in Judge Major's opinion (R. 137-138), it would not be possible under Rule 17(c) to obtain, *ex parte*, inspection of documentary evidence "merely by filling in the blank space of a subpoena"

(R. 138), because Rule 17(c) expressly provides that it is for the court to direct production and to permit inspection. It was for this reason that the order in question was entered by the district court only after notice and full hearing.

IV.

The Rules of Criminal Procedure govern a wide variety of prosecutions, and were therefore so drafted as to give to the trial judges a liberal grant of discretion. The issue presented here is not merely an inspection problem, but concerns the discretion of a trial court to exercise intelligent pre-trial supervision to avoid confusion confounded in this type of criminal case—an intricate antitrust trial. The Federal Rules of Criminal Procedure should be construed to enable a district court to guide the orderly progress of a trial. The district court's inherent power to control the disposition of litigation pending before it should not be thwarted by a narrow construction of the pre-trial procedures provided by the Criminal Rules.[14]

The Judicial Conference of the United States in its report dated November 25, 1949, recognized the importance from the standpoint of the public interest of "effective, expeditious and economic disposition" of antitrust litigation (Report of the Judicial Conference of the United States held at Washington, D. C., September 22-24, 1949, pp. 26-27). Judges Wyzanski and Medina, before whom important antitrust cases are pending, have entered orders directed at both parties providing for pre-trial inspection and discovery that will expedite those cases and reduce

14. Cf. McAllister, "The Big Case: Procedural Problems in Anti-Trust Litigation" (1950), 64 Harv. L. Rev. 27, 61; Dession, "The New Federal Rules of Criminal Procedure: II" (1947), 56 Yale L. J. 197, 221-222; Dession, "The Trial of Economic and Technological Issues of Fact: I and II" (1949), 58 Yale L. J. 1019 and 1022. Professor Dession was a member of this Court's Advisory Committee on the Criminal Rules.

them to a manageable compass.[15] Rule 17(c) furnishes the trial judge in a criminal case with an effective tool to provide in advance for an orderly presentation of the evidence at the trial, to save the court's time and to enable defendants more precisely to prepare for trial.

It has recently been pointed out by another judge that the Government expects to inspect the documents of defendants in antitrust cases and should reciprocate. Thus, Judge Yankwich stated:

> "In all these [antitrust] cases, * * * the Government expects the utmost cooperation of the defendants or even *prospective defendants* in placing their files and records, ranging over periods of years, at the disposal of its agents. When objection is encountered, the widest use is made of the process of the courts. A justified criticism of the Government is, however, that *it is not so generous in reciprocating.* Thus, the Government stands on the liberal rules which allow them to plead the facts generally and resists *at all stages, every attempt to compel them,* through bills of particulars, to supply data which would give the defendants a definite idea of the line of attack which they may expect at the trial. Judges, in our circuit, including myself, have been rather generous in compelling disclosure, so as to *channel* the inquiry. I believe that this method has been time-saving, * * *." (Yankwich, "Observations on Anti-Trust Procedures" (1950), 10 F. R. D. 165, 168; author's italics).

The decision of the court below is unrealistic in failing to recognize the policy of the Federal Rules of Criminal Procedure that, in the interest of simplicity and of expedition of trials, a liberal discretion should be given to the trial judge in regard to pre-trial disclosure in order to "channel the inquiry." Review of the decision below by this Court would be plainly in the public interest in order to resolve

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15. See McAllister, *op. cit.*, pp. 28, 29, 31-32, 36, 39, 53 and 59.

the varying interpretations of Rule 17(c) adopted by the lower courts, and so that the liberal purpose of the rules may be vitalized and the administration of justice expedited.

Conclusion.

The decision below voices an issue which has not been, but should be, settled by this Court, and it conflicts with the decision of the Court of Appeals for the Second Circuit. Several district court decisions are also in conflict. The questions presented are of general importance. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1950.